affirmative namely, that his determination was correct in point of law and that the appeals were correctly dismissed.

Order accordingly.

Solicitor: *Ng Kian Fong.*

TEO CHENG LEONG v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Tan Ah Tah and Chua JJ.) October 21, 1970]

[Singapore — Criminal Appeal No. 4 of 1970]

Criminal Law and Procedure — Abolition of trial by jury — Whether person who has been committed for trial before coming into force of amendment abolishing trial by jury had an accrued right to trial by jury — Assizes — Criminal Procedure Code (Cap. 132), ss. 147 and 179 — Criminal Procedure Code (Amendment) Act, 1969 — Courts of Judicature Act 1964, ss. 19 and 20.

Criminal Law and Procedure — Commencement of trial — When begins.

Criminal Law and Procedure — Trial — Capital offence — Defence counsel assistance scheme — Benefit of representation.

The appellant had been arrested and charged under section 4 of the Arms Offences Ordinance with using a firearm. He was brought before a magistrate's court and a preliminary inquiry held in the 9th magistrate's court on June 20, 21 and 26, 1969. The magistrate's court sent the record of proceedings to the registrar of the High Court who received it on September 26, 1969. As the appellant was not legally represented at the preliminary inquiry, the deputy registrar, because the appellant was facing a capital charge, on September 29, 1969 assigned an advocate and solicitor to represent him at the trial. The advocate and solicitor accepted the assignment on October 9, 1969. An effort was made to fix a date for trial on December 9, 1969 but no date was fixed. On December 30, 1969 the deputy registrar fixed the period February 17 to 23, 1970 as the dates for the trial of the appellant. On January 5, 1970 the Criminal Procedure Code (Amendment) Act, 1969 came into operation and this repealed the whole of the Chapter dealing with trials before the High Court with a jury and deleted all references to juries in the Criminal Procedure Code. The appellant was therefore tried before two judges of the High Court and he was found guilty and sentenced to death. On the appeal it was contended *inter alia* (1) the only forum for trial of a person committed at a preliminary inquiry is "the next ensuing assizes or the one to which such assizes may postpone the trial and none other". The non-compliance with the provisions of section 179 of the Criminal Procedure Code in this case constituted an incurable illegality because the tribunal which finally tried the appellant had in fact no jurisdiction to try him; (2) there was a miscarriage of justice in this case in that by reason of the unlawful delays in bringing the appellant to trial the appellant was deprived of a trial by jury; (a) there was a miscarriage of justice in that the appellant was tried by a tribunal which had no jurisdiction to try him at the time of his trial.

Held, dismissing the appeal: (1) the statutory requirement to name as "assizes" sessions of the High Court for the despatch of its original criminal business was abolished by the Courts of Judicature Act, 1964 and in so far as the provisions of section 179 of the Criminal Procedure Code are inconsistent or conflict with the provisions of sections 19 and 20 of the Courts of Judicature Act, 1964 the provisions of the Act must prevail;

(2) in any event, the provisions of section 179 of the Criminal Procedure Code are not mandatory and are merely directory and are intended to provide for as speedy a trial as possible in the High Court of accused persons, whose cases the Public Prosecutor has designated should be placed for trial before the High Court;

(3) in this case there was no delay on the part of anyone concerned in bringing the case against the appellant before the High Court for trial and there was accordingly no disregard of the provisions of section 147(1) of the Criminal Procedure Code, no irregularity and no miscarriage of justice;

(4) in enacting the Criminal Procedure Code (Amendment) Act, 1969 the legislature had clearly manifested its clear intention to take away any right an accused person had acquired or accrued to him to a trial by jury when the repealing enactment came into operation;

(5) in this case as the trial of the appellant had not commenced before the High Court before the coming into operation of the Criminal Procedure Code (Amendment) Act, 1969 the appellant did not have an accrued right to be tried by a jury at the time of the coming into operation of the Act;

(6) on the facts the appellant was rightly convicted of the offence charged against him and there was no sufficient ground or reason for interfering with the sentence imposed by the trial court.

Cases referred to:-

(1) *Colonial Sugar Refining Co.* v. *Irving* [1905] A.C. 369.
(2) *State* v. *P.K. Swamy & Anor.* A.I.R. 1953 Madras 451.
(3) *Venugopala* v. *Krishnaswami* [1943-4] F.C.R. 39.
(4) *Srinivasachari* v. *The Queen* I.L.R. 6 Mad. 336.
(5) *Emperor* v. *Fitzmaurice* I.L.R. 6 Lah. 262.
(6) *Shreekant Pandurang* v. *Emperor* A.I.R. 1943 Bom. 169.
(7) *Ram Singh* v. *The Crown* A.I.R. 1950 E.P. 25.
(8) *Chari* v. *The State* A.I.R. 1959 All. 149.

COURT OF CRIMINAL APPEAL.

David Marshall (*J. B. Jeyaretnam* with him) for the appellant.

Tan Boon Teik (Attorney-General and Public Prosecutor) (*S. Rajendran* Deputy Public Prosecutor with him) in person.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is an appeal by the appellant, Teo Cheng Leong, against his conviction and sentence by the High Court consisting of Winslow J. the presiding judge, and Kulasekaram J. on a charge of using a firearm under section 4 of the Arms Offences Ordinance (Cap. 112) which provides that "Any person who uses or attempts to use any arm shall on conviction be punished with death or imprisonment for life." The appellant was sentenced to death.

The first ground of appeal is that there was a miscarriage of justice in that "The appellant having been committed for trial on the 26th June 1969 (at the end of a preliminary inquiry) was not tried, as required by the law in force throughout 1969, 'at the Assizes next ensuing after such committal" but was in fact tried several Assizes and many months later — on the 17th February 1970."

The facts which led to the appellant being committed for trial before the High Court are not in dispute. On 26th March 1969 at about 2.50 p.m. the appellant and three others, armed with two revolvers and two daggers, entered a two-storey terraced house, No. 492 Sims Avenue, and robbed the occupants. They then left through the back door of the premises but a hue and cry was raised and the appellant, after a chase, was arrested in a hut off Lorong 39 where he had taken refuge. At the time of his arrest he was in possession of a revolver from which he had, just before his arrest.

fired two shots. The next day another of the robbers, Khoo Meng Hwa, was arrested and on the 29th March 1969 a third robber, Ng Chwee Bock, surrendered himself at the Criminal Investigation Department. The fourth robber is still at large.

The appellant was subsequently charged under section 4 of the said Arms Offences Ordinance with using a firearm and also with armed robbery. Khoo Meng Hwa and Ng Chwee Bock were similarly charged with armed robbery. With a view to committal for trial to the High Court the appellants, Khoo Meng Hwa and Ng Chwee Bock were brought before the 9th magistrate's court and a preliminary inquiry was held in that court on the 20th, 21st and 26th June 1969 under the provisions of Chapter XVII of the Criminal Procedure Code. At the conclusion of the prosecution evidence the presiding magistrate framed the following two charges: —

(i) "You, Teo Cheng Leong, are charged that you, on or about the 26th day of March 1969 at about 2.15 p.m. in a hut off Lorong 39 Geylang, Singapore, did use an arm, to wit, a Pasper .22 inch short-rim fire revolver No. 35388 by discharging from it two shots, and you have thereby committed an offence punishable under section 4 of the Arms Offences Ordinance (Chapter 112)."

(ii) "You, 1. Teo Cheng Leong
2. Khoo Meng Hwa
3. Ng Chwee Bock

are charged that you, on or about the 26th day of March 1969 at about 2.15 p.m. at 492 Sims Avenue, Singapore, together with one other person unknown in furtherance of the common intention of all of you, committed robbery of cash amounting to $1,300, jewellery worth $1,500, a camera worth $200, 2 wrist watches worth $50, a national phonogram worth $100 in the possession of Chow Sow Lin and that at the time of committing the said robbery, you were armed with deadly weapons, to wit, revolvers and daggers, and you have thereby committed an offence punishable under sections 392 and 397 read with section 34 of the Penal Code (Chapter 119)."

The appellant and his co-accused, after the charges were duly read and explained to them, reserved their defences and they were accordingly, on 26th June 1969, committed for trial before the High Court. At the preliminary inquiry the appellant was not legally represented.

Mr. Marshall for the appellant submits that immediately upon the appellant's committal for trial before the High Court, section 179 of the Criminal Procedure Code applied. This section, which was in force until the 4th January 1970 when the Criminal Procedure Code (Amendment) Act 1969, which *inter alia*, repealed section 179, came into operation, provides as follows: —

"179.(1) Every accused committed for trial shall, unless the High Court otherwise orders, be tried at the assizes next ensuing after such committal.

(2) The court, in its discretion, on the application of the Public Prosecutor or the accused by motion in open court supported when the applicant is the accused by affidavit, may postpone the trial of any person charged at any assizes to the next or any subsequent assizes."

Mr. Marshall says that "the assizes next ensuing after" the committal for trial on 26th June 1969 of the appellant was, according to a notification by the deputy registrar of the High Court, scheduled to commence on 21st July 1969 and to continue thereafter until 15th August 1969. The appellant was not produced before the High Court until 17th February 1970. His trial on the capital charge commenced on 18th February 1970 when he was first charged before the High Court. It is common ground that no section 179(2) application was made to postpone the trial.

In those circumstances Mr. Marshall's contention is that as "the only forum for trial of a person committed at a preliminary inquiry is 'the next ensuing Assizes' or the one to which such Assizes may postpone the trial and none other", the non-compliance with the provisions of section 179 constituted an incurable illegality because the tribunal which finally tried the appellant had in fact no jurisdiction to try him.

In dealing with this submission the question arises what the word "assizes" means in section 179 as it is not defined in the Criminal Procedure Code. It appears however in section 49 of the Courts Ordinance (Cap. 3) which reads as follows: —

"49.(1) Sessions for the despatch of the original criminal business of the High Court, to be called Assizes, shall be held in Singapore not less than six times in each year.

(2) Such Assizes shall be distributed as equally as conveniently may be over the twelve months in each year and the times for holding the same shall be fixed by the Chief Justice, either for the year or for particular occasions, by notices to be published in the *Gazette*, or otherwise a reasonable time before the days fixed for holding the same.

(3) The Chief Justice, subject to any direction of the Yang di-Pertuan Negara may, after the publication of any such notice, alter the days fixed for the Assizes, if it is expedient so to do, and may appoint other times and places for holding Assizes whenever occasion arises for so doing.

(4) The Chief Justice, subject to any direction of the Yang di-Pertuan Negara, may also appoint Special Assizes whenever he thinks it necessary so to do."

However, the whole of Part VI, which includes section 49, of the Courts Ordinance was repealed on 16th March 1964 by the Courts of Judicature Act 1964, when Singapore was part of Malaysia, but which continued in force as law in Singapore until it was repealed and replaced by the Supreme Court of Judicature Act 1969 which came into operation on 9th January 1970. On this question Mr. Marshall submits that section 19 and section 20 of the Courts of Judicature Act 1964 provide the answer. These sections provide as follows: —

"19. Every High Court shall sit at such times and at such places as the Chief Justice thereof shall from time to time appoint.

20. The distribution of business among the several Judges of each High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Justice of such High Court."

He says that the provisions of these two sections are by way of substitution of the powers of the repealed section 49 of the Courts Ordinance and that there is no question of abolishing Assizes because under the new sections 19 and 20 (of the Judicature Act 1964) the Chief Justice still has the same powers to appoint the sittings of the High Court for the despatch of its original criminal business and his discretion is less limited. There is no prohibition of the use of the word "Assizes" and the Chief Justice has discretion to use any name for such sittings including the name

"Assizes". The only thing that was abolished was the statutory requirement to name as "Assizes" such sittings of the High Court for the despatch of its original criminal business. Having regard to Practice Direction No. 1 of 1964 of the Chief Justice ([1964] M.L.J. lxxxvi) and monthly circulars from the Registrar of the High Court intituled "Monthly Hearing of Criminal Cases" since that Practice Direction, it is submitted that the Chief Justice has since 1964 been giving directions for monthly sittings of the High Court for the despatch of its original criminal work and that such directions are consistent with the substitution of the words "sittings of the High Court for the despatch of original criminal business next ensuing after such committal" for the words "assizes next ensuing after such committal" in section 179(1) of the Criminal Procedure Code.

We are unable to accept Mr. Marshall's submissions. First, sections 19 and 20 of the Courts of Judicature Act 1964 replace not only section 49 but also section 50(1) of the Courts Ordinance which provides thus: —

"50.(1) Subject to the sittings of the High Court for Criminal Assizes and to the sittings of the Court of Appeal the other business of the Court shall be regulated as the Chief Justice shall direct."

It is clear also that the repeal of section 49 and section 50(1) of the Courts Ordinance by the Courts of Judicature Act 1964 not only abolished the statutory requirement to name as "Assizes", sessions of the High Court for the despatch of its original criminal business but, by the enactment of section 18 and section 19 of the Courts of Judicature Act 1964, the legislature has also abolished the requirement (under the repealed section 49(1)) to have separate sessions or sittings for the despatch of the original criminal business of the High Court and *ipso facto* abolished the requirement to hold not less than six such sessions or sittings in each year. Similarly the requirements under the repealed section 49(2) to fix and to publish in the *Gazette* the times for holding such sessions or sittings were also abolished.

It seems to us clear beyond doubt that the business of the High Court, its distribution, the manner, times and places for the despatch of all its business are governed by the provisions of sections 19 and 20 of the Courts of Judicature Act 1964 which give the power to the Chief Justice to appoint or to give directions accordingly.

It follows, in our judgment, that the provisions of section 179 of the Criminal Procedure Code are inconsistent or conflict with the provisions of sections 19 and 20 of the Courts of Judicature Act 1964 and that the latter provisions must prevail because of section 4 of the Courts of Judicature Act 1964 which reads as follows: —

"4. In the event of inconsistency or conflict between the provisions of this Act and the provisions of any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail."

Even assuming Mr. Marshall to be correct that the provisions of section 179(1) should be construed, with the repeal of section 49 of the Courts Ordinance, to mean that every accused committed for trial shall be tried at the sitting of the High Court for the despatch of its original criminal business next ensuing after such committal, we are unable to agree that non-compliance with this section constituted an incurable illegality whereby the tribunal which finally tried the appellant had in fact no jurisdiction.

We also reject Mr. Marshall's submissions that the only forum, by virtue of the provisions of section 179, which he contends is a mandatory section, for the trial of a person committed for trial at a preliminary inquiry is "the next ensuing assizes" or in view of the repeal of section 49 of the Courts Ordinance, the next ensuing sitting of the High Court for the despatch of original criminal business. It seems to us obvious that the expression "assizes" as used in the Criminal Procedure Code or in the Courts Ordinance does not mean forum, in the sense of a tribunal before which a criminal trial is being held, nor can a *sitting* of the High Court for the despatch of original criminal business be said to be a forum in the sense of a tribunal before which a criminal trial is being held. It seems to us clear beyond doubt that under Chapter XXI of the Criminal Procedure Code, which deals with all trials by jury, the tribunal before which an accused person is tried is a tribunal consisting of a High Court judge and a jury of seven persons who are chosen by lot from persons summoned to act as jurors.

It also seems to us, having regard to all the provisions of the Criminal Procedure Code, that the provisions of section 179 are not mandatory. It is a misconception to say that immediately upon the presiding magistrate at a preliminary inquiry committing an accused person for trial before the High Court, the provisions of section 179 applied. Section 147 makes this quite clear. The material words are: —

"147.(1) When the accused is committed for trial the Magistrate's Court shall send a copy of the record of the proceedings to the Public Prosecutor and to the accused and, when it receives an order from the Public Prosecutor to do so, the original record and any document, weapon or other thing which is to be produced in evidence to the Registrar.

(4) The record shall comprise the following particulars:—

(n) the charge;"

We would draw attention also to sections 171, 393, 394, 397, 398, 401 and 402 of the Criminal Procedure Code. We do not propose to set out these sections but merely to say that having regard to them and to section 147 the High Court, through its registrar, receives the record of the proceedings before the preliminary inquiry at the stage when the Public Prosecutor, having formed the opinion that a criminal offence is disclosed by the record of the proceedings before the preliminary inquiry magistrate and that further proceedings should be taken against the accused person and that the evidence taken is sufficient to afford a foundation for a full and proper trial; having framed a charge or charges in writing signed by him or by some person authorised by him in that behalf; having by his fiat designated the High Court as the court before which the case shall be placed for trial and having ordered the magistrate's court to transmit the record containing the particulars specified in section 147(4) to

the court so designated, the magistrate's court sends the record to the registrar of the High Court.

In the present case, although the magistrate's court committed the appellant for trial on 26th June 1969 the record was not in fact received by the registrar of the High Court until 26th September 1969, the date when the order of the Public Prosecutor to transmit the record to the High Court was received by the magistrate's court.

In our judgment the provisions of section 179 are not mandatory and are merely directory and are intended to provide for as speedy a trial as possible in the High Court of accused persons, whose cases the Public Prosecutor has designated should be placed for trial before the High Court.

It is further to be observed that as the appellant had not engaged an advocate and solicitor to defend him at his trial before the High Court, a counsel was assigned to represent him by the registrar of the High Court, in accordance with a defence counsel assistance scheme initiated decades ago so as to enable all persons accused before the High Court of capital offences to have the benefit of legal representation if they are unable to afford counsel of their own choice. We are completely satisfied that on all the facts that have come to our knowledge there was no delay on the part of anyone concerned in bringing the case against the appellant before the High Court for trial. There was accordingly, in our opinion, no disregard of the provisions of section 147(1) of the Criminal Procedure Code, no irregularity and no miscarriage of justice.

It follows, therefore, we are of the opinion that there is no substance in the appellant's second ground of appeal which reads as follows: —

"There was a miscarriage of justice in that by reason of the unlawful delays in bringing the appellant to trial in flagrant contravention of specific statutory provisions: (a) the appellant was deprived of a trial by a tribunal whereof the judges of fact would have been a jury, and (b) he was tried by a tribunal radically distinct from the tribunal which would have tried him had he been tried at any time during 1969."

During the hearing of the appeal the only specific statutory provision which was drawn to our attention as having been flagrantly contravened was section 179 of the Criminal Procedure Code and this submission we have already dealt with earlier on in this judgment as also the submission of unlawful delays in bringing the appellant to trial. We reiterate that this ground of appeal couched in unusually extravagant language is without foundation in fact and in law.

The appellant's third ground of appeal reads as follows: —

"There was a miscarriage of justice in that the appellant was tried by a tribunal which had no jurisdiction to try him at the time of his trial in 1970 after Act No. 17 of 1969 came into force on the 5th January 1970."

The facts which are material for the consideration of this ground of appeal are these. The appellant and his two co-accused were committed for trial by a magistrate's court after a preliminary inquiry The appellant's committal was in respect of two charges and the other two accused persons' committal was in respect of one charge. The date when the committal order was made was 26th June 1969. The magistrate's court pursuant to section 147 of the Criminal Procedure Code, *supra*, sent the record of the proceedings to the registrar of the High Court on 26th September 1969 who received it on the same day.

The appellant was not legally represented at the preliminary inquiry and on receipt of the preliminary inquiry record from the magistrate's court, the deputy registrar, because the appellant was facing a capital charge, on 29th September 1969 assigned an advocate and solicitor of the High Court, Mr. Jeyaretnam, as counsel to represent the appellant at his trial on the capital charge. Mr. Jeyaretnam on 9th October 1969 accepted the assignment. On 18th November 1969 Mr. Jeyaretnam was requested by the deputy registrar to appear before him on 6th December 1969 for the purpose of fixing a date for the trial of the appellant. It would appear that on 6th December 1969 no date was fixed for the trial of the appellant as on 30th December 1969 Mr. Jeyaretnam was again requested by the deputy registrar to appear before him that same afternoon for the purpose of fixing a date for trial. On 30th December 1969 the deputy registrar then fixed the period 17th to 23rd February 1970 for the trial of the appellant. The period 1st December to 31st December 1969 was the period when the High Court was on annual court vacation. It has always been the practice of the High Court that during the court vacation the High Court does not sit to deal with any of its business except for urgent business which would be dealt with by the vacation judge. It has also always been the practice of the High Court to hear cases under a fixed date system except for criminal cases when sections 49 and 50 of the Courts Ordinance (Cap. 3) were in force. With the repeal of these two sections by the Courts of Judicature Act 1964 the fixed date system was introduced for the hearing of criminal cases in the High Court and to this effect the following directions were made by the Chief Justice on 30th June 1964: —

"Registrar's Circular No. 3 of 1964

Criminal Cases for Trial in the High Court, Singapore.

The Courts of Judicature Act, 1964 (No. 7 of 1964) having repealed section 49 of the Courts Ordinance (Cap. 3) of the Laws of the State of Singapore, the Honourable the Chief Justice directs that it is no longer necessary to publish the monthly list of criminal cases for trial in the High Court.

As from the date of this circular, criminal cases for trial in the High Court will only appear in the weekly list of cases for hearing in the High Court.

Sd: T. S. Sinnathuray,
Registrar,
High Court, Singapore."

"Practice Direction No. 1 of 1964

Criminal Cases for Trial in the High Court, Singapore.

Reference is made to Registrar's Circular No. 3 of 1964.

The Honourable the Chief Justice directs that from the 1st day of July, 1964, the procedure for the hearing of criminal cases in the High Court of Singapore is as follows:—

(a) On receipt of the preliminary inquiry record under section 147 of the Criminal Procedure Code (Cap. 132), and where the accused is represented by counsel, the registrar shall notify the deputy public prosecutor and defence counsel to attend before him for dates for the trial of the accused.

At the fixing of dates the registrar is to be informed of any interlocutory application (e.g. application for bail) that has to be made before a judge. If there is such an application the registrar shall as soon as convenient thereafter have the accused produced before the judge nominated by the Honourable the Chief Justice to hear criminal cases for the month.

(b) Where the accused is unrepresented, the registrar shall notify the public prosecutor of the fact and the accused shall be produced as soon as possible before the aforesaid judge for the plea to be taken.

Where the accused claims to be tried, dates shall be assigned for the hearing of the case.

Sd: T. S. Sinnathuray,
Registrar,
High Court, Singapore."

It is also necessary for a full and proper consideration of this ground of appeal to set out certain administrative steps taken to deal with the original criminal business of the High Court. Although the aforesaid Registrar's Circular No. 3 of 1964 ([1964] M.L.J lxxxvi) states that the Chief Justice has directed that it was no longer necessary to publish the monthly lists of criminal cases for trial in the High Court and that from thenceforth criminal cases for trial would only appear in the weekly list of cases for hearing in the High Court, in practice "monthly" lists continued to be issued by the registry under the hand of the deputy registrar or assistant registrar listing the criminal cases to be heard before a named High Court judge and the dates fixed for trial of cases named in the list. A scrutiny of such "monthly" lists covering the period July 1969 to February 1970 shows that each "monthly" list covered a period of four weeks and also shows that, as far as possible having regard to the commitments of counsel, dates for trial of criminal cases were fixed in the order in which the records were sent by the magistrates' courts to the registrar.

When the appellant was on 26th June 1969 committed for trial and when the record of the proceedings before the preliminary inquiry was received on 26th September 1969 section 178(1) of the Criminal Procedure Code provided as follows: —

"178.(1) In all cases where the punishment of death is authorised by law the accused shall be tried by jury."

As at 26th September 1969 the Criminal Procedure Code also contained sections 179 to 231. These sections together with section 178 were grouped under the heading "Chapter XXI Trials Before The High Court With a Jury."

On the 17th February 1970, when the trial of the appellant commenced the whole of Chapter XXI had been repealed and replaced by a new Chapter XXI which came into operation on 5th January 1970. The material provisions of the repealing Act, known as The Criminal Procedure Code (Amendment) Act, 1969 read as follows: —

"2. The Criminal Procedure Code is hereby amended by deleting the words 'WITHOUT A JURY' appearing in the cross-heading of Chapter XXA thereof.

3. Chapter XXI of the Criminal Procedure Code commencing with section 178 thereof and ending with section 238, inclusive of both sections, is hereby repealed and the following substituted therefor: —

CHAPTER XXI.
TRIAL OF CAPITAL OFFENCES BEFORE THE HIGH COURT.

Trial before two Judges.

178.(1) In all cases where the accused is charged with an offence in respect of which punishment of death is authorised by law, the accused shall be tried by a court consisting of two Judges of the High Court, one of whom shall be the presiding Judge.

(4) The provisions of the Criminal Procedure Code specified in the first column of the Schedule to this Act are hereby amended in the manner set out in the second column of the said Schedule."

The Schedule to the Criminal Procedure Code (Amendment) Act 1969 deleted all references to juries wherever they appeared in the principal Act.

Mr. Marshall's submission is that as the appellant should have been tried at the sitting of the High Court on 21st July 1969, that sitting being the sitting of the High Court for criminal business next ensuing after the appellant's committal for trial, the appellant had on that date an acquired or accrued right to be tried by jury as provided by section 178(1) before that section was repealed by the Criminal Procedure Code (Amendment) Act 1969. Accordingly, even though his trial commenced after the coming into operation of the Criminal Procedure Code (Amendment) Act 1969, which abolished trial by jury and substituted in its place trial by a court consisting of two judges of the High Court, he should have been tried by a tribunal consisting of a judge and jury and in accordance with the provisions of Chapter XXI before the repeal of its provisions by the Criminal Procedure Code (Amendment) Act 1969.

We have already dealt with Mr. Marshall's submission as to the effect of section 179(1) of the Criminal Procedure Code after the repeal of sections 49 and 50(1) of the Courts Ordinance and the enactment of sections 19 and 20 of the Courts of Judicature Act, 1964.

The real question to be decided on this ground of appeal is whether or not the appellant before the coming into operation of the Criminal Procedure Code (Amendment) Act, 1969 had an accrued right to be tried by jury before jury trials were abolished by the 1969 amending Act. Mr. Marshall submits he has such an accrued right and relies on section 16 of the Interpretation Act, 1965, the Privy Council decision in the *Colonial Sugar Refining Co.* v. *Irving*[1] and several decisions of the courts in India.

In deciding this question it is important to observe that a person has no inherent right to any particular mode of trial or to trial by jury if he is charged with a capital offence. In Singapore the mode of trial of a person accused of a criminal offence is governed exclusively by the provisions of the Criminal Procedure Code, section 3 of which reads: —

"3. All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained; and all offences under any other law shall be inquired into and tried according to the same provisions, subject, however, to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences."

The capital offence of which the appellant was charged is an offence under the Arms Offences Ordinance (Cap. 112). This enactment does not regulate the manner or place of inquiring into or trying offences under it and therefore the manner and place of inquiring into and trying the offence of which the appellant was charged are governed by the provisions of the Criminal Procedure Code.

At the time of the appellant's committal for trial and at the time the record as specified in section 147(4) was received by the registrar of the High Court the manner of trying the offence which he was alleged to have committed is set out in Chapter XXI under the cross-heading "Trials before the High Court with a Jury" comprising sections 178 to 238 of the Criminal Procedure Code. On 5th January 1970, before the appellant ever appeared or was brought before the High Court, the Criminal Procedure Code (Amendment) Act 1969 came into force, which amending Act repealed the cross-heading and the said sections 178 to 238 and replaced them with a new cross-heading "Trials of Capital Offences before the High Court" and a new section 178.

The amending Act also repealed the words "Without a Jury" in the cross-heading "Trials Before The High Court Without A Jury" of Chapter XXA which comprises sections 177A to 177F. These sections set out the procedure to be followed at all trials before the High Court without a jury whereas sections 178 to 238 set out the procedure to be followed at all trials before the High Court with a jury together with all the machinery for compiling jury lists, the qualifications to serve as a juror and the machinery for summoning jurors and choosing them to form a jury.

It will be seen therefore that the amending Act not only repealed section 178 which provides the manner of trying cases where the punishment of death is authorised by law, that is trial by jury, and provided in its place a different manner of trial, that is trial by a court consisting of two judges of the High Court but it also repealed by its section 2 all the machinery provisions of the Criminal Procedure Code which enabled a jury to be chosen so as to enable a "trial by jury" to take place.

Both Mr. Marshall for the appellant and the learned Attorney-General relied on the provisions of section 16 of the Interpretation Act, 1965 the material provisions of which read as follows: —

"16. Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not —

(a) .....;

(b) .....;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;

(d) .....;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

The Attorney-General submits that before considering the question whether or not the appellant had an accrued right to a trial by jury before the coming into force of the 1969 amending Act, effect must be given to the words "unless the contrary intention appears" in section 16 of the Interpretation Act, 1965. He submits that the 1969 amending Act manifests, by abolishing the entire machinery provisions enabling a trial by jury to be held, the clear intention of the legislature to abolish the system of trial by jury as from the date of its coming into operation and by necessary intendment that the amending Act is to have retrospective effect so as to take away any accrued right to a trial by jury.

We agree with his submission in the light of a consideration of the whole of the amending enactment, which not only substitutes a different manner of trial for all capital offences and abolishes the machinery provisions to enable a trial by jury to be held, but also by its other provisions deletes all references to juries wherever they appear in the *parent* enactment. In our opinion the legislature has clearly manifested its clear intention to take away any right an accused person had acquired or accrued to him to a trial by jury when the repealing enactment came into force on 5th January 1970.

It is right, however, that we should express our views on Mr. Marshall's contention that before the coming into force of the repealing enactment, the appellant had an acquired or accrued right to trial by jury.

As stated earlier, he relies on the *Colonial Sugar Refining Co.* case, *supra*, and some decisions of the courts in India as supporting the submission that the appellant acquired the right to trial by jury when he was committed for trial on 26th June 1969 by the committing magistrate. We do not consider it necessary to deal with the cases relied on by Mr. Marshall except the case of *The State* v. *P. K. Swamy & Anor*,[2] where the judgment of Somasundaram J. of the Madras High Court referred at length to the *Colonial Sugar Refining* case and to the Indian decisions cited by Mr. Marshall. In this connection we would emphasise that decisions of the courts in India afford valuable guidance as our Criminal Procedure Code is practically identical in phraseology and content with the Code of Criminal Procedure in force in most of the States in India.

The material facts in *Swamy's* case, taken from the judgment, were that the two accused in the case were on 28th July 1952 committed by a magistrate's court to take their trial in the High Court for offences under section 120-B Indian Penal Code and section 5(2) read with section 5(1)(c) of Act II of 1947 and section 477 read with section 34 Indian Penal Code. The offences under section 5(2) read with section 5(1)(c) of Act II of 1947 and section 477 Indian Penal Code were offences triable exclusively by the sessions court. On 28th July 1952 that is 20 days after the order of committal, Act 46 of 1952 was passed under which, by section 7, the forum for the trial of certain offences, one of which is an offence under section 5(2) of Act II of 1947 was altered so as to make such an offence triable by a special judge only, who is appointed by the State Governor.

Section 8 of the Act 46 of 1952 provided for the procedure and powers of special judges in the trial of such offences and under that section a court of the special judge shall be deemed to be a Court of Sessions trying the case without a jury or without the aid of assessors.

Before Somasundaram J. it was contended that section 7 of the Criminal Law Amendment Act (Act 46 of 1952) was retrospective in its operation and after the said enactment the High Court of Madras had no jurisdiction to try the offence under section 5(2) of Act II of 1947 and that it was triable only by the appointed Special Judge. Dealing with this contention Somasundaram J. made the following observations: —

"It is well settled that

'no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication'.

It is equally well-settled that a statute which affects the procedure only is retrospective and

'no one has any vested right in any course of procedure. He has only a right of prosecution or defence in the manner prescribed for the time being by or for the court in which he sues and if an Act of Parliament alters that mode of procedure he has no other right than to proceed according to the altered mode'."

The learned judge in dealing with the question whether the trial of Swamy in the High Court related to a right in existence on the date of the enactment of Act 46 of 1952 or to a mere matter of procedure then quoted the following well known passage of Lord Macnaghten in *Colonial Sugar Refining Co.* v. *Irving*, *supra*: —

"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

The learned judge further observed that the Federal Court of India had in the case of *Venugopala* v. *Krishnaswami*[3] followed the decision in the *Colonial Sugar Refining Co.* case and decided that a right to continue an action which has been well commenced is a substantive right. He then referred to three cases, all relied on by Mr. Marshall, *Srinivasachari* v. *The Queen*[4] *Emperor* v. *Fitzmaurice*[5] and *Shreekant Pandurang* v. *Emperor*[6] as having established, applying the principle enunciated in the *Colonial Sugar Refining Co.* case, that once a criminal case is well commenced such rights as the accused has — such as the right to have the case tried with the aid of jury — are substantive rights which cannot be affected by a change in the law.

Finally, the learned judge held that on the date of the order of commitment the accused had a vested right to be tried in the High Court of Madras with the aid of a jury and he could not be deprived of that right

In support, he referred to the decision of the Full Bench in *Ram Singh* v. *The Crown*[7] as having established that if an order had been validly passed committing a case to the Court Sessions under the law then in force, a subsequent change in the law would not divest the Court of Sessions of its jurisdiction to try it and the accused acquired a vested right to have the case continued in that court and tried according to the law in force on the date of the order of commitment.

In our judgment there can be no doubt that the principle enunciated in the judgment of Lord Macnaghten, *supra*, applies to criminal proceedings and we would respectfully agree with the Indian cases that the question is when can a criminal case be said to have well commenced. The learned Attorney-General has referred us to the case of *Chari* v. *The State*[8] in which Chowdhry J. of the Allahabad High Court disagreed with the view of Somasundaram J. in *Swamy's* case that "the case can be said to have well commenced when the order of commitment is made" although Chowdhry J. too was in no doubt that certain propositions of law in this connection were well settled in the following observations: —

"Now, certain propositions of law in this connection are axiomatic. Unless provided expressly or by necessary implication, no statute is retrospective in its operation, but a statute which affects procedure only is retrospective.

The retrospectivity of a procedural statute will not however, affect substantive rights which have already vested in a citizen. One such right is that although nobody has a vested right in any course of procedure, there is a vested right to continue the proceedings in the tribunal before which the same had already commenced according to the state of law as it stood at the time of the commencement of the proceedings: *Colonial Sugar Refining Co. Ltd.* v. *Irving* [1905] A.C. 369 (B); *Marsh* v. *Higgins*, (1850) 9 C.B. 551 (C). (*Venugopala Reddiar* v. *Krishnaswami Reddiar*, [1943] F.C.R. 39; (A.I.R. 1944 F.C. 24) (D), *G. Veeraya* v. *N. Subbiah Choudhry*, [1957] S.C.R. 488: (S) A.I.R. 1957 S.C. 540) (E). These were decisions in civil cases, but the principle laid down in them is equally applicable in criminal cases."

In *Chari's* case the order of commitment under section 212 Code of Criminal Procedure was made on 1st March 1952. The Criminal Law Amendment Act (Act 46 of 1952), *supra*, came into force on 28th July 1952. A special judge was appointed on 1st September 1952. Notwithstanding, the trial of the accused commenced on 4th May 1953 before an Additional Sessions Judge with the aid of a jury. It was contended on behalf of the accused that Act 46 of 1952 having been passed and a special judge appointed thereunder trial in a sessions court with a jury was barred.

In his judgment on the question whether the trial of the appellant had already commenced before a Sessions Judge, Chowdhry J. said: —

"The crucial question therefore is whether the trial of the appellants had already commenced before a Sessions Judge. Before taking up that question of fact I would like to express, respectfully and in all humility, my disagreement with the view taken in some cases, *e.g.*, in the *State* v. *P.K. Swamy*, A.I.R. 1953 Mad. 451 (C), that 'the case can be said to have well commenced when the order of commitment is made.' The Code of Criminal Procedure prescribed in ss. 190 to 199B certain conditions requisite for initiation of various proceedings. Such a pre-requisite for a magistrate taking cognizance of an offence is, under s. 190, receipt of a complaint or a police report or information from any person other than a police officer or the magistrate's own knowledge or suspicion. Likewise, the pre-requisite for a Court of Sessions taking cognizance of an offence as a court of original jurisdiction is, under s. 193, the committal of the accused to that court by a magistrate duly empowered in that behalf.

That being so, to say that a trial in the Court of Session commences when the order of commitment is made is to confuse the cause with the effect. An order of commitment

passed by the inquiring magistrate under s. 213 of the Code can no more be tantamount to commencement of proceedings before a Court of Session than can the filing of complaint or the making of a report by a police officer or the furnishing of information by a person other than a police officer or the knowledge or suspicion of the magistrate himself under s. 190 be tantamount to commencement of trial before the magistrate.

So far as the Criminal Law Amendment Act is concerned, it does away entirely with commitment so much so that by s. 10 it cuts short proceedings pending before any magistrate, commitment proceedings or any other, by providing for immediate transfer of such cases to the appropriate special judge. The Act is no doubt silent with regard to cases, like the present, where an order of commitment has already been passed; but any such provision would have been redundant.

It may perhaps be that the passing of an order of commitment, being a condition precedent to the cognizance of an offence being taken by a Court of Session, entitles the accused so committed to be tried by a Court of Session; but the Act leaves that right intact since it provides in sub-s. (3) of s. 8 that for the purposes of the provisions of the Code of Criminal Procedure the court of the special judge shall be deemed to be a Court of Session. True, the procedure before a special judge is a truncated one in that it is a trial without a jury or without the aid of assessors, besides its being justifiable in the larger interests of providing 'for a more speedy trial', the accused himself cannot make a grievance of it inasmuch as 'no one has any vested right in any course of procedure'.

The thing to see, therefore, in order to find out whether the trial of the appellants had already commenced in a Court of Session before the coming into force of the said Act and the appointment of a special judge thereunder is, not if an order of commitment had already been made, but if anything had been done which could legally be interpreted as amounting to a commencement of trial. Chapter XXIII of the Code of Criminal Procedure deals with trials before High Courts and Courts of Session and it is sub-divided into many parts. One such part is headed Commencement of Proceedings and comprises three sections, 271, 272 and 273. Of these only the first two sections apply to trials before a Court of Session, the last one being confined in its application to trials before the High Court. And in the first two sections also sub-s. (1) of s. 271 is the only provision dealing specifically with the subject of commencement of trial, sub-s. (2) of that section and s. 272 dealing with what is to be done if the accused pleads guilty or if he refuses to or does not plead or if he claims to be tried. Strictly speaking, therefore, the provisions of sub-s. (1) of s. 271 are the only relevant provisions to be looked into in order to find out whether a particular trial had commenced. The sub-section runs as follows:-

'271. Commencement of trial—(1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried'.

Analysed, the sub-section is composed of the following ingredients (1) the Court being ready to commence the trial, (2) the accused appearing or being brought before it, (3) the charge being read out in Court and explained to the accused, and (4) the accused being asked whether he is guilty of the offence charged, or claims to be tried.

After examining the facts, Chowdhry J. observed: —

"The above examination of the record however shows that certain important proceedings had already been had in the sessions court prior to the appointment of the special judge.

Not only was the Sessions Court ready to commence the trial but the accused had appeared before it and witnesses for the prosecution and defence, the latter at the instance of the accused themselves, and jurors had been summoned. Of the aforementioned ingredients of s. 271 of the Code the first two therefore stood satisfied, and, although there had yet been no compliance with the remaining two ingredients, a deep penetration into the heart of the trial, as it were, had been made by defence witnesses having been summoned at the instance of the accused, as provided by s. 289 of the Code."

It is to be observed that Chapter XXIII of the Code of Criminal Procedure of India is in all respects identical with Chapter XXI of our Criminal Procedure Code before its repeal by the 1969 amending Act, except for those sections in the Indian Code which deal with the procedure where the trial is before a sessions court and which refer to assessors. In particular the Indian ss. 271 and 272 are identical with our former ss. 181 and 182.

With respect, we prefer the views expressed by Chowdhry J. to those of Somasundaram J. and in our case the thing to see, in order to find out whether the trial of the appellant had already commenced in the High Court before the coming into force of the 1969 amending Act is, not if an order of committal had already been made, but if anything had been done under the provisions of the Criminal Procedure Code which could legally be interpreted as amounting to a commencement of trial. The facts which are material to be considered have already been set out earlier. They show that the first appearance by the appellant before the High Court was on 17th February 1970 and never before.

It is also to be observed that the Indian Code has no provisions similar to our Chapter XXXIV consisting of sections 391 to 404 of the Criminal Procedure Code. In our opinion the provisions of the whole of Chapter XXXIV support our view that the commencement of the proceedings against the appellant before the High Court had not yet taken place before the coming into force of the 1969 amending Act and that the High Court, in so far as criminal proceedings are concerned, is not seised of a case until the accused is brought before it and charged before it.

We are accordingly of the opinion that at the time of the coming into operation of the Criminal Procedure Code (Amendment) Act 1969 the appellant did not have an accrued right to be tried by jury.

The other grounds of appeal which relate to the conviction of the appellant are in our judgment of no substance also. The trial judges accepted the evidence of the police eye-witnesses that the appellant came out of the back door of the building where he had taken refuge and on finding that his escape was blocked by the presence of his pursuers, fired two shots at police inspector Olivero and then retreated into the building until he finally surrendered, still holding his revolver, after tear gas shells had been shot into it.

The final ground of appeal relates to the sentence of death imposed by the trial court. Section 4 of the Arms Offences Ordinance (Cap. 112) enacts that "any person who uses or attempts to use any arm shall on conviction be punished with death or imprisonment for life".

We have carefully considered all the facts and circumstances, which we have briefly recapitulated at the outset of our judgment, leading to the commission of this offence, and we find no sufficient ground or reason for interfering with the sentence imposed by the

trial court which consisted of two experienced High Court judges.

Accordingly, we affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

Solicitors: *J. B. Jeyaretnam & Co.*

ONG KIANG KEK v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Tan Ah Tah and Winslow JJ.) October 21, 1970]

[Singapore — Criminal Appeal No. 6 of 1970]

Criminal Law and Procedure — Trial before High Court — Duty on court to consider at the close of the case of prosecution whether or not a case has been made out against accused which if unrebutted would warrant his conviction — Criminal Procedure Code (Cap. 132) s. 177C.

Penal Code, s. 34 — Common intention.

In this case the appellant had been charged that "together with three other persons unknown, in furtherance of the common intention of all of you, committed murder by causing the death of one Mohamed Salleh bin Haji Hassan, and have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the Penal Code". At the trial at the close of the prosecution case, counsel for the appellant submitted that he had no case to answer on the ground that the prosecution had failed to make out a *prima facie* case against the appellant. This submission was rejected. The appellant was later convicted and sentenced to death.

Held, allowing the appeal: (1) the trial court is required by section 177C of the Criminal Procedure Code, at the close of the prosecution case to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt. If the court finds at that stage of the trial that it has not been so established there is nothing left but to acquit the accused;

(2) in this case the evidence tendered by the prosecution was clearly insufficient to establish that at the time when one of the four occupants of the car fired the two shots which killed the deceased, the killing of the deceased was done in furtherance of the common intention of all of them so that it mattered not which of them actually fired the fatal shots;

(3) it was clear that if at the close of the prosecution case the evidence was such that it was possible for the fatal shots to have been fired by any of three of the four men in the car no case had been made against the appellant which if unrebutted would warrant his conviction of murder *simpliciter;*

(4) the trial court was therefore wrong in law in calling on the appellant to enter on his defence whether on the charge of murder read with section 34 or of murder *simpliciter* and the appellant should have been acquitted at the close of the case for the prosecution.

Cases referred to:-

(1) *Public Prosecutor* v. *Lim Teong Seng & Ors,* [1946] M.L.J. 108.

(2) *Teo Cheng Leong* v. *Public Prosecutor, ante* p. 275.

COURT OF CRIMINAL APPEAL.

David Marshall (*Leo Fernando* with him) for the appellant.

S. Rajendran (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): The appellant, Ong Kiang Kek, was tried before the High Court consisting of two judges, convicted and sentenced to death on the following charge: —

"That you, Ong Kiang Kek @ Ah Boy on or about the 20th day of May, 1969, at or about 11.30 a.m. at Sumbawa Road, Singapore, together with three other persons unknown, in furtherance of the common intention of all of you, committed murder by causing the death of one Mohd. Salleh bin Hj. Hassan, and have thereby committed an offence punishable under Section 302 of the Penal Code read with Section 34 of the said Code (Chapter 119)."

He now appeals against his conviction and it is submitted by counsel for the appellant, *inter alia,* that the judges erred in law in calling upon the appellant for his defence and that the conviction is unreasonable or cannot be supported having regard to the evidence. It is convenient to deal with these two submissions together.

The principal prosecution witness at the trial was the widow of the deceased who was an eye-witness of how the deceased, her husband met his death on 20th May 1969. At that date she was employed as an amah at the Tanglin Club and her husband as a watchman at Thomson Road Hospital. They lived at No. 17B Jalan Kassim and that morning, as was his usual custom, he was taking her on the pillion of his motorcycle to her place of work. As they were travelling along the middle of Sumbawa Road, the engine of the motor-cycle developed some trouble causing it to slow down gradually. She then heard the sound of horning from a motor car horn, sounded twice, and her husband steered the motor-cycle to the left side of the road and brought it to a stop about one yard from the edge of the road. They both alighted, she to the left and her husband to the right of the motor-cycle and he began tinkering with the engine while she looked on. The motor-cycle was then on its stand. She noticed a car, which she later identified as a Ford Cortina motor car, which had passed them stop about 36 feet — at one stage she said about 60 feet — from the parked motorcycle and saw four male Chinese alight from it and walk towards where she and her husband were. On seeing them walking in their direction she became afraid and told her husband that these four Chinese were walking towards them.

On being told this, her husband stopped tinkering with the engine of the motor-cycle and walked towards the four men and they met about 30 feet from where she was still standing beside the motor-cycle. She saw the four men group around her husband who had his back to her. One of the four was directly facing her husband and also in her direction and she heard this person ask her husband in Malay the question "why obstruct our path?" She did not hear her husband reply to the question but she herself, from where she was, volunteered the reply in Malay that the motorcycle was out of order. She said a short dialogue took place between her husband and the four men but she could not hear what was said and then they walked